IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,
Petitioner,

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE HUALAPAI TRIBE, THE LAGUNA PUEBLO, THE MOHEGAN INDIAN COMMUNITY, THE NAVAJO TRIBE, THE SAN CARLOS APACHE TRIBE, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, as AMICI CURIAE, IN SUPPORT OF PETITIONER.
AND NEZ PERCE TRIBE of IDAHO

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I. INTEREST OF AMICI CURIAE

The parties have consented, by written stipulation of May 18, 1972, to the filing of this brief. The stipulation has been filed with the Clerk of the Court.

The interest of the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Laguna Pueblo of New Mexico, the Metlakatla Indian Community of Alaska, the Navajo Tribe of Arizona and New Mexico, the Nez Perce Tribe of Idaho, the San Carlos Apache Tribe of Arizona, the Salt River Pima-Maricopa Indian Community of Arizona, and the Seneca Nation of Indians of New York in the question presented by this case is fully set forth in the motion for leave to file a brief as *amici curiae* in support of the petition for certiorari. In summary, the Association on American Indian Affairs is a non-profit membership corporation, with a nationwide membership of 50,000, devoted to the purpose of protecting the rights and improving the welfare of American Indians. The Indian tribes are recognized tribes of American Indians, all of whom are affected by the same legal, social and economic problems which face the Mescalero Apache Tribe and all of whom are seeking with equal vigor to raise the standard of living of their members through local commercial enterprises and resource development.

This case presents a question of great and continuing concern to the Association and to Indians generally—the question of whether a state may impose its taxation power on activities engaged in by an Indian tribe, with the direct assistance of the federal government, for the social and economic benefit of its members. The Association and the Indian tribes are most of all concerned that the governmental interests of the United States in Indian self-determination and Indian economic development through self-help be so identified in this case as to remove those interests from the scope of a state's power of taxation.

II. ARGUMENT

A. INTRODUCTION

The Mescalero Apache Tribe, acting through its duly constituted tribal government, and with financial, planning and technical assistance from the federal government, opened a ski resort on lands leased from the United States Forest Service outside the boundaries of the Mescalero Apache Reservation. Income from this tribal enterprise is being used solely for the educational, social and economic welfare of members of the Tribe and to repay funds which were furnished by the federal government for construction of the resort and acquisition of personal property used in the resort's operation. The ski resort, in addition to providing revenue for the welfare of tribal members, provides a job-training center and employment for many tribal members.

The State of New Mexico has attempted to exact two taxes from the Tribe in connection with its business enterprise. One tax is laid upon the gross receipts of the tribal enterprise in return for the Tribe's privilege of doing business in New Mexico. The second tax is laid upon the storage, use or consumption of personal property in connection with the enterprise and is measured by the cost price of the property.

New Mexico's attempt to tax the Mescalero Tribe is the first effort by a state to levy a tax directly upon an Indian tribe for any purpose. It is an attempt which also interferes directly with two current federal policies in Indian affairs. These two policies are to improve the economic status of Indian tribes through federally assisted self-help and to strengthen self-government by encouraging active participation by the tribes in federal

programs which affect the welfare of tribal members. The essence of both policies is to encourage the tribes, acting through their duly constituted tribal governments, themselves to perform functions for the betterment of tribal members which were formerly performed by the federal government with minimal participation by the tribes, and to provide such financial and other assistance as is necessary for the tribes to perform those functions. *Indian Affairs, The President's Message to the Congress*, 5 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 894 (1970).

The question in the case at bar, therefore, is whether the current interests of the federal government in improving the economic condition of our Indian citizens through self-help and in strengthening the self-governmental role of Indian tribes, can be constitutionally subordinated to the interest of a state in raising tax revenues to fulfill general state purposes. If, as in former days, the federal government were itself operating an enterprise for the benefit of an Indian tribe, there would be no question as to that government's immunity from state taxation. There is also no question that instrumentalities utilized by the United States in carrying out powers lawfully residing in that government enjoy the same immunity from state taxation as does the government itself. *Amici curiae* contend that the Mescalero Apache Tribe, acting through its duly constituted tribal government, is such an instrumentality of the United States, and that it is, therefore, absolutely immune from state taxation of any kind without a specific waiver of

immunity by Congress.[4] *Dep't. of Employment v. United States*, 385 U.S. 355 (1966); *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664 (1899). Moreover, even if the tribe were not such an instrumentality in the constitutional sense, it is at least performing many federal functions, and no state tax can be exacted from the Tribe which would interfere with the performance of those functions. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Union Pacific C. R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873).

I. THE MESCALERO APACHE TRIBE IS A FEDERAL INSTRUMENTALITY AND, THEREFORE, ABSOLUTELY IMMUNE FROM TAXATION BY THE STATE OF NEW MEXICO

The principle that the states have no power to impose a taxation burden upon the means utilized by the federal government to fulfill that government's powers was established early in the history of our nation. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As the following discussion will show, Indian tribes not only operate in a framework of controlling federal law, but also perform a variety of governmental functions which otherwise would fall upon the United States. These tribes thus constitute federal instrumentalities, and are insulated by the federal government's immunity from the

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[4] The State of New Mexico does not contend that the Congress of the United States has conferred power upon it to exact a tax of any kind from the Tribe. The State argues that the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, did not *preclude* the Tribe from exercising its taxing powers with respect to Indian trade or tribal property used in connection with off-reservation activity.

direct application of state tax laws, even with respect to off-reservation economic development activities.

That the federal government has paramount power over Indians, Indian tribes and Indian affairs is unquestioned. This power is founded upon the Constitution [U.S. CONST., Art. 1, §8, cl. 3; Art. II, §2, cl. 2; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 350, 379 (1832)]; upon the fiduciary relationship between the federal government and Indian tribes [*United States v. Kagama*, 118 U.S. 375, 383 (1886)]; and upon the nature of the federal government's relationship to Indian land. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 240, 259, 261 (1823).

There is also no limit to the territorial scope of the federal government's paramount Indian power. Since the federal power finds its source not only in the trust relationship of the federal government to Indian land, but also in the Constitution and treaties of the United States, this Court long ago recognized that the exercise of the power is not restricted to property or activities within the boundaries of a reservation. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417-18 (1866); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). The only limit to the federal government's Indian power is that it depends upon the continued existence of tribal organization. *United States v. Sandoval*, 231 U.S. 28 (1913); *Perrin v. United States*, 232 U.S. 478 (1914).

The United States, of course, continuously has recognized the tribal existence of the Mescalero Apache Tribe. It entered into a treaty with the Tribe on July 1, 1852. 10 Stat. 979. The Congress has passed numerous statutes dealing with the Tribe specifically.[2] Pursuant to the Act

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[2] *See, e.g.*, Act of June 20, 1878, 20 Stat. 206; Act of April 23, 1880, 21 Stat. 81; Act of March 3, 1881, 21 Stat. 485; Act of

of June 18, 1934, 48 Stat. 984, the Secretary of Interior approved the constitution of the Tribe on March 25, 1936, and the Tribe now performs its self-governmental functions in accordance with that constitution. The Tribe, in performing those self-governmental functions, is also subject to a host of general statutes dealing with Indian affairs [e.g., Title 25, United States Code] and extensive regulations [e.g. Title 25, Code of Federal Regulations] promulgated by the Secretary of the Interior pursuant to his discretionary authority over Indian affairs. 25 U.S.C. §1 [illegible].

This continuous federal recognition of the tribal status of the Mescalero Apache Tribe fully supports the plenary power of the federal government over the Tribe, acting through its duly constituted tribal government, within or without the boundaries of the Mescalero Reservation. Federal recognition of tribal status is also one of the bases which supports the proposition that the Tribe is an instrumentality of the United States in fulfilling its plenary powers and is immune from all forms of state taxation laid directly thereon.

The Court recently stated that there is "no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality." *Dept. of Employment v. United States*, 385 U.S. 355, 359 (1966). The Court there held that the Red Cross was an instrumentality of the United States, absolutely immune from state taxation without specific consent from Congress, because of a number of factors showing a close relation to federal

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January 6, 1923, 42 Stat. 1222; Act of May 25, 1918, 40 Stat. 591; Act of March 29, 1928, 45 Stat. 1776; Act of June 22, 1936, 49 Stat. 213.

activities. The Red Cross provides services to our Armed Forces, helps to fulfill some of the treaty commitments of the United States and assists the federal government with domestic disaster relief. 385 U.S. at 359. Performance of these federal functions was sufficient to grant the Red Cross the constitutional status of an instrumentality even though "government officials do not direct its everyday affairs." 385 U.S. at 360. The Court also relied on certain statutes [42 U.S.C. §§1855a(f); 1855b; 1855c] to show that Congress has recognized that the Red Cross performs national functions. 385 U.S. at 359. These statutes provide for distribution of supplies through the Red Cross in times of domestic disaster and for cooperation between federal agencies and the Red Cross in providing disaster assistance.

The Court has also held that an Army post exchange, selling retail goods to the Armed Forces, is a federal instrumentality since operated pursuant to federal authority and subject to regulations of the Secretary of the Army. *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942). This authority and regulation, "together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined." 316 U.S. at 483. The Court also noted that Congress had recognized the governmental activities of post exchanges by appropriating funds from time to time for the construction thereof. 316 U.S. at 484. Furthermore, post exchanges do not operate for private profit purposes. 316 U.S. at 485. See also *Query v. United States*, 316 U.S. 486 (1942).

In determining whether an institution is an instrumentality of the United States, it is immaterial that the

institution engages in proprietary activities. Since all of the authority of the federal government is derived from constitutional powers, the Court has often made clear that for the purpose of applying the doctrine of federal immunity from state taxation there is no distinction between proprietary and governmental instrumentalities.[5] *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961); *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939).

While the Court weighs a number of factors in determining whether an institution is an instrumentality, there appear to be two factors that are of primary importance.[6] The object seeking to clothe itself in federal immunity must be designed to carry out a federal program or purpose [*Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941); *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664 (1899)] and it is not entitled to tax immunity, even though it fulfills a federal function, if it exists primarily for private profit purposes.

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[5]Any claim that the Mescalero Apache Tribe, by operating a business enterprise, is performing proprietary rather than governmental functions would only be relevant if the Tribe were claiming immunity from federal tax on the grounds of being a state instrumentality. *New York v. United States*, 326 U.S. 572 (1945); *Allen v. Regents*, 304 U.S. 439 (1938); *Ohio v. Helvering*, 292 U.S. 360 (1934). The Tribe, of course, makes no such claim.

[6]An additional primary factor which the Court should weigh in determining whether an Indian tribe is an instrumentality of the United States is that it cannot be sued, for payment of taxes or otherwise, without the specific consent of Congress. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Red Cliff Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 377 F.2d 829 (8th Cir. 1967); *Maryland Casualty Co. v. Citizens Nat. Bank*, 361 F.2d 517, 520 (5th Cir. 1966).

United States v. Boyd, 378 U.S. 39 (1964); *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

In *United States v. Rickert*, 188 U.S. 432 (1903), the Court had occasion to consider the applicability of the instrumentality doctrine in Indian affairs.[5] There the Court held that lands, improvements thereon, and personal property of Indian allottees were instrumentalities of the United States in fulfilling federal purposes as reflected in the General Allotment Act of February 8, 1887, 24 Stat. 388, *codified at* 25 U.S.C. §331 *et seq.* These purposes were for the United States to hold allotted lands in trust for individual Indians for a period of time and to transfer the lands in fee to the allottees when they were found capable of handling their own affairs. The lands, improvements and personal property were found to be the means adopted by the United States to prepare the Indian allottees for absorption into the American mainstream. 188 U.S. at 437. *See also Dewey County v. United States*, 26 F.2d 434 (8th Cir. 1928); *United States v. Thurston County*, 143 F. 287 (8th Cir. 1906).

Rickert was decided at a time when the policy of the United States in Indian affairs was to break up tribal organization and to force the assimilation of Indians into the general society and economy. Means were adopted by

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[5] The first case involving the attempt by a state to tax individual Indians was *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). The Court did not dispose of the issue on grounds of the instrumentality doctrine but solely on jurisdictional grounds. So long as the United States recognizes the tribal existence of any Indians, the Court stated, they and their property are withdrawn from the operation of all state laws and enjoy the privilege of "total immunity" from state taxation. 72 U.S. (5 Wall.) at 755, 757.

the federal government gradually to achieve this goal and *Eckert* gave to those means the status of tax-immune instrumentalities. The allotment scheme, however, was a disaster for the tribes. The primary result was that vast tracts of Indian land were transferred to non-Indian ownership, and the scheme enjoyed little success in its efforts to break down tribal organization. The allotment scheme, as a measure to force Indian assimilation, subsequently was abandoned. Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 ANNALS 12 (1957).

The Congress having recognized the drastic failure of the General Allotment Act, in achieving its purposes, reversed that policy in 1934 and adopted new means to fulfill its new policy. Indian Reorganization Act of June 18, 1934, 48 Stat. 984, *codified at* 25 U.S.C. §461 *et seq.* One of the central purposes of the Act was to "stabilize the tribal organizations . . . with real, though limited, authority and [to set down] conditions which must be met by such tribal organizations." S. Rep. No. 1080, 73d Cong., 2d Sess. 1 (1934). Substantial land was restored to tribal ownership, and new lands replaced some of the tribal lands lost to non-Indian ownership during the allotment period. 25 U.S.C. §§463, 465. Lands and other rights acquired for the tribes were declared specifically to be free from state and local taxation. 25 U.S.C. §465. Funds were appropriated for the organization of Indian corporations [25 U.S.C. §469] and for the operation of those corporations. 25 U.S.C. §470. The provisions of the Act applied to all recognized tribes in the United States other than the tribes in Oklahoma. 25 U.S.C. §473.

The central purpose of the Indian Reorganization Act was to institutionalize tribal organization. To that end,

the tribes were encouraged and authorized to adopt constitutions which were subject to ratification by the tribal members and approval by the Secretary of the Interior. 25 U.S.C. §476. The Act declared that such constitutions should enumerate certain specific powers of the tribes, "in addition to all powers vested in any Indian tribe or tribal council by existing law." 25 U.S.C. §476. All of the constitutions so adopted were, in fact, prepared by the Department of Interior. *See Hearings on Const. Rights of the American Indian*, 87th Cong., 1st Sess., pt. 1, at 165 (1962).

The purposes of the Indian Reorganization Act, therefore, were to be fulfilled by a number of means. The central means was to be the tribe, acting through its duly constituted tribal government, for the common welfare of tribal members. The tribe, therefore, acting pursuant to its constitution, is no less an instrumentality for effectuating federal policy, than were the lands, improvements and personal property in *United States v. Rickert, supra.* In 1934 the Congressional policy had changed, and the focus of the means adopted to effectuate that policy had changed from the allotment scheme to organized tribal government, but the principles established in *Rickert* were as applicable in 1934 as in 1903.

Except for a brief period in the 1950's, Congress has not waivered from its purpose of institutionalizing tribal organization. In the 1950's Congress specifically permitted a number of states to assume civil and criminal jurisdiction over tribes within their borders and provided for additional states to assume such jurisdiction in the future without the consent of the affected tribes. Act of August 15, 1953, 67 Stat. 588, *codified at* 18 U.S.C. §1162; 28 U.S.C. §1360. In 1968, however, Congress

prohibited any further assumption of state jurisdiction without the consent of the tribes and made tribal governments, for the first time, subject to restrictions in dealing with tribal members similar to those contained in the United States Constitution's Bill of Rights. Act of April 11, 1968, 82 Stat. 77, *codified at* 25 U.S.C. §1301-41 (Supp. 1972). The Congress in drafting this legislation took great pains to preserve the tribes as self-governing, culturally autonomous units [*see Hearings on Const. Rights of the American Indian*, 87th Cong., 1st Sess., pt. 1 (1962); 87th Cong., 1st Sess., pt. 2 (1963); 87th Cong. 2d Sess., pt. 3 (1963)] and to continue the policy established by the Indian Reorganization Act.

Pursuant to its constitution, the Mescalero Apache Tribe performs numerous self-governmental functions. Control of tribal lands is committed to the Tribal Council, subject to applicable federal authority. Art. III, §1. Rights of membership in the Tribe are to be determined by the Tribal Council in accordance with the tribal constitution; and no decree of any court, other than the tribal court, may purport to determine membership rights in the tribe. Art. IV, §§3, 5. The Tribal Council is empowered to veto any attempted disposition of tribal lands by any agency of the federal government without the consent of the Tribe [Art. XI, §1(a)]; to manage tribal lands, acquire additional lands and to regulate the disposition of tribal property of all kinds [Art. XI, §1(e)]; to negotiate contracts, leases and agreements of every description with the approval of the Secretary of the Interior [Art. XI, §1(f)]; to condemn land of tribal members for public purposes [Art. XI, §1(g)]; to act in all matters that concern the welfare of the tribe [Art. XI, §1(k)]; to adopt ordinances regulating law enforcement on the reservation, regulating social and domestic rela-

tions of tribal members, regulating inheritance of personal property of tribal members, and regulating the exclusion of non-members from the Reservation. Art. XI, §1(p). The Tribal Court is empowered to exercise jurisdiction in all criminal matters involving members of the Mescalero Apache Tribe or members of other Indian tribes residing on the reservation, subject to certain conditions. Art. XXV, §1; *see also*, 18 U.S.C. §1152. The Tribal Court is also authorized to exercise absolute civil jurisdiction where only members of the Tribe are involved. Art. XXV, §2.

The Tribal Council is empowered to adopt plans of operation for the conduct of business or industry that will

> "further the economic well being of the members of the tribe, and to undertake any activity of any nature whatsoever, not inconsistent with Federal law or with this Constitution, designed for the social or economic improvement of the Mescalero Apache people, such plans of operation and activities to be subject to review by the Secretary of Interior." Art. XI, §1(d).

The tribal council must annually adopt and approve a budget for every tribal business enterprise and that budget must be approved by the Secretary of Interior. Art. XIII, §1.

The constitution of the Mescalero Apache Tribe institutionalizes all powers of self-government of the Tribe which the Tribe enjoyed prior to adoption of the constitution and which this Court has zealously protected from interference by the states, in the absence of specific consent to such interferences from Congress, for almost 150 years. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Quiver*, 241 U.S. 602 (1916);

Mechan, 175 U.S. 1 (1899); *Talton v. Mayes*, 163 U.S. 376 (1896). Only where there was no threat to the federal interest in Indian self-government has this Court been willing to permit a state even peripherally to touch the self-governmental powers of the tribes, in the absence of specific consent from Congress. *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. 621 (1881); *Langford v. Monteith* 102 U.S. 145 (1880).

The interests of Congress in Indian economic development, for the benefit and welfare of tribal members, and in strengthening tribal self-government are, therefore, apparent in this case. The tribe, and its duly constituted tribal government, is not only one of the means but the very focal point upon which fulfillment of these interests is predicated. The Congress has recognized not only the existence, but also the governmental activities of the Tribe through statutes, administrative regulations and practice, and through appropriations for the benefit of the tribe. *See, e.g., Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942). The Tribe is clearly carrying out federal purposes and its continued existence by consent of Congress is designed to fulfill these purposes. *See, e.g., Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95 (1941). It does not exist, of course, for private purposes. *See, e.g., United States v. Boyd*, 378 U.S. 39 (1964).

The doctrine of intergovernmental tax immunity must protect the Mescalero Apache Tribe, as an instrumentality of the United States, from state taxation. While the Court has found no simple test for determining what is an instrumentality, the Mescalero Apache Tribe survives any

test which the Court has applied.[6] If national banks are to be given the continued status of instrumentalities for the purpose of immunity from state taxation, particularly when their federal functions are today extremely limited compared with the functions which they performed when the *McCulloch* decision was rendered, then surely Indian tribes are entitled to the same status. *First Agric. Nat. Bank v. State Tax Comm.*, 392 U.S. 339 (1968); *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931); *First Nat. Bank v. Anderson*, 269 U.S. 341 (1926); *Owensboro Nat. Bank v. Owensboro*, 173 U.S. 664 (1899); *Osborn v. United States*, 22 U.S. (9 Wheat.) 738 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

C. IF THE MESCALERO APACHE TRIBE IS NOT A FEDERAL INSTRUMENTALITY, IT NONETHELESS PERFORMS FEDERAL FUNCTIONS WHICH ARE UNCONSTITUTIONALLY BURDENED AND IMPEDED BY THE TAXES SOUGHT TO BE EXACTED BY THE STATE OF NEW MEXICO IN THIS CASE

In applying the instrumentality doctrine, the decisions of the Court have not often drawn a rigid line between the taxable and the immune. The Court has been required, in many cases before it, to observe

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[6] The fact that the tribal enterprise is located outside the boundaries of its reservation has no relevance to application of the instrumentality doctrine. *See* text *supra*, p. 6. If this were to be the basis for denying the Tribe that status, then the federal government's immunity depends upon its use of means solely within the reservation boundaries to fulfill its powers over Indian affairs. There are no such territorial limits to the scope of the federal government's Indian powers. There cannot, therefore, be any such territorial limit to the means the federal government adopts to fulfill those powers.

distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system.

James v. Dravo Contracting Co., 302 U.S. 134, 150 (1937). The central problem which the Court has encountered in applying the immunity doctrine since *McCulloch* occurs where private citizens or institutions have sought to clothe themselves in the absolute immunity of the federal government. *See, e.g., Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Union Pacific C.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). As the Court stated in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 483 (1939):

> [T]he expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.

In most of the immunity cases in which the Court has determined that persons or institutions were not instrumentalities of the United States, the claimants of that status were performing limited governmental functions, engaged in government activity in a limited fashion and for the purpose of reaping private profits or deriving some private benefit. *See, e.g., James v. Dravo Contracting Company*, 302 U.S. 134 (1937); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Wagoner v. Evans*, 170 U.S. [illegible] (1898); *Union Pacific C.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). In denying such claimants the status of instrumentalities, which would have made them abso-

lutely immune from state taxation, the Court has applied a qualification of the instrumentality doctrine in order to protect federal governmental interests from state taxation while not extending the cloak of immunity to the claimant's private interest. This qualification is that even if one dealing with the government is not an instrumentality, the performance of his federal function may not be interfered with by state taxation efforts.[7] *See, e.g., Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Trinityfarm Constr. Co. v. Grosjean*, 291 U.S. 466 (1934); *Alward v. Johnson*, 282 U.S. 509 (1931); *Union Pacific C.R. Co. v. Peniston*, 85 U.S. (18 Wall.) 5 (1873). This rule has been applied to non-Indian business lessees and licensees of Indian land.[8] *Montana Catholic*

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[7] A third element of the intergovernmental tax immunity doctrine is that the states can never tax, in any form, the property interests of the United States regardless of whether these interests are in the hands of the United States, an instrumentality thereof or someone dealing with the federal government in a limited fashion such as a lessee or contractor. *United States v. County of Allegheny*, 322 U.S. 174 (1944); *Mayo v. United States*, 319 U.S. 441 (1943); *Wisconsin Central R.R. Co. v. Price County*, 133 U.S. 496 (1889). Property interests of the United States are being taxed in this case in the sense that the funds for construction of the tribal enterprise, and for acquisition of personal property used in the enterprise, were provided by the United States.

[8] In the non-Indian lessee and licensee cases cited in the text, the Court found no interference with any federal function of the lessee or licensee. The Court subsequently switched to clothing non-Indian lessees in federal immunity. *Choctaw O. & G. R. Co. v. Harrison*, 235 U.S. 292 (1914); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Jaybird Mining Co. v. Weir*, 271 U.S. 609 (1926). In these cases the Court held that the non-Indian lessees or the leases themselves were instrumentalities of the United States in performing some federal

Missoula, 200 U.S. 118 (1905); *Thomas v.* 169 U.S. 264 (1898); *Wagoner v. Evans*, 170 U.S. (1898).

The federal functions of the Mescalero Apache Tribe, through its duly constituted tribal government,

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obligations to the Indian lessors. No inquiry was made into whether any of the taxes involved impaired any federal functions of the lessees since a finding that either the lessees or leases were instrumentalities resulted in total immunity from state taxation. One of the results of this line of cases was that lessees of state lands were held immune from federal taxes on the theory of reciprocal immunity of federal and state governmental instrumentalities. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932). As a result, the Court, concerned with the growing cloak of immunity for private interests specifically overruled many of the cases involving non-Indian lessees and began a trend, in cases not involving Indians for the most part, to deny the status of instrumentalities to mere agents of the federal and state governments acting in their own private interests and to apply the sole test of whether a federal or state tax impaired any federal or state function of such agents. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

After these non-Indian lessee cases had been reversed, the Court had only one further occasion to consider the status of non-Indian lessees directly. In *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), the Court found that such a lessee was not an instrumentality of the federal government and that a state tax based upon the lessee's share of the oil produced from the Indian land did not impair any federal function of the lessee. The Court additionally noted that the case did not involve taxation of the interests of the Indians themselves. 336 U.S. at 352.

The result of all of these cases is that non-Indians were no longer permitted to cloak themselves with federal immunity by virtue of their peripheral contacts with Indian affairs. No rights of these individuals were directly impaired and no rights of Indian lessors were directly involved.

have been enumerated in the previous section. One of its primary functions is to work with the Secretary of Interior to improve the economic welfare of tribal members. It is authorized, to this end, to set up business enterprises, with the income therefrom to be used for the benefit of tribal members and for effectuating many self-governmental powers and duties conferred upon, and confirmed to, the Tribe by the federal government. The State of New Mexico has attempted to exact a tax measured by the gross receipts of the enterprise in return for the Tribe's privilege of doing business in the State. This tax could prevent the enterprise from generating any income with which the Tribe can fulfill its federal functions. A second tax is laid upon the personal property of the Tribe used in the enterprise, and this tax has the effect of diminishing not only income but the amount of funds available to the Tribe to invest in such an enterprise. Such taxes fall directly upon the Tribe and would interfere with the performance of the Tribe's functions to the same extent, at the very least, that a tax laid directly on a contract with the federal government, or a tax for the privilege of performing the contract, would impair the federal function of a government contractor. Such taxes are impermissible. *See, e.g., Kern-Limerick v. Scurlock*, 347 U.S. 110 (1954); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

III. CONCLUSION

The policy of the federal government in Indian affairs has vacillated between attempts to assimilate Indians into the general society and economy and attempts to protect their cultural identity. The Congress and the President have now rejected the past federal termination policies in

[illegible] of a policy to improve the economic status of [illegible] tribes through federally assisted self-help and to [illegible]engthen self-government by encouraging active tribal [illegible]ticipation in developing an economic base that will [illegible]pport and sustain tribal life.

The traditional economic bases of Indian life are no [illegible]nger sufficient to sustain the majority of Indians on [illegible] reservations. Accordingly, the federal government [illegible]s encouraged the tribes to adopt some elements of the [illegible]odern economy. Many tribes have done so within the [illegible]undaries of their reservations, particularly those tribes [illegible]ose remaining natural resources can be used in a [illegible]anned program of economic development. Other tribes, [illegible]th the assistance of the federal government, have had [illegible] adopt the only means of economic development [illegible]ailable to them, even if those means are located outside [illegible]e confines of their reservations. The Mescalero Apache [illegible]be is one of those tribes.

The federal government now recognizes that if Indians [illegible]re to escape from the economic, social and psychological [illegible]pression and dependence created by some past federal [illegible]olicies, it must commit itself to help Indian tribes [illegible]dvance towards economic and social goals of their own [illegible]hoosing. The government is clearly fulfilling this com[illegible]itment in this case. The interests of the federal govern[illegible]ment which are reflected in that commitment must not [illegible]e subordinated to general revenue-raising interests of a [illegible]tate. This Court always has protected the right of the [illegible]federal government to be free from state limitation in [illegible]fashioning its policy for regulation of Indian affairs. That [illegible]ght is threatened again in this case. Not only law but a

century and one-half of history have committed t
Court the task of dispelling that threat.

Respectfully submitted,

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